Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

VERN T. WEISS, *et al.*,

*Petitioners,*

v.

STATE OF ALASKA, *et al.*,

*Respondents,*

**Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Alaska**

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

In 1956, Congress established a trust of 1 million acres of land in Alaska to be used for mental health programs. When Alaska did not comply with the federal law creating the trust, a class action was brought and a settlement was eventually approved over the objection of the petitioners who had been designated as class representatives. The questions presented are:

1. May a state court approve a settlement of class action claims arising under federal law premised on clear misinterpretations of federal law?

2. May a state court, consistent with Due Process, approve a settlement of class action claims arising under federal law where (a) the original class counsel, without notice to any class member, agreed to a set-off defense that substantially undermined the value of the class claims, and (b) those who supported the settlement were never found to fairly represent the class and admitted that they failed to investigate one of the class' federal damages claims worth potentially over $1 billion?

## PARTIES TO THE PROCEEDINGS

Petitioners are Vern T. Weiss, father and next friend of Carl Weiss, on behalf of himself and all others similarly situated; and Mary C. Nanuwak and Billy R. Cross, on behalf of themselves and all others similarly situated.

Respondents are the State of Alaska; Anita Bosel, Frances Doulin, Sharon Goodwin and Gabriel Mayoc; H.L., M.K., and Alaska Addiction Rehabilitation Services; Alaska Center for the Environment, Alaska Sportfishing Association, Lynn Canal Conservation, Northern Alaska Environmental Center, Sierra Club, Southeast Alaska Conservation Council, Susitna Valley Association, and Trout Unlimited; Marathon Oil Company and Union Oil Company of California; Usibelli Coal Company; Idemitsu Alaska, Inc.; and John Morris.

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## PETITION FOR WRIT OF CERTIORARI

Vern T. Weiss, on behalf of himself and all others similarly situated, and Mary C. Nanuwak and Billy R. Cross, on behalf of themselves and all others similarly situated, respectfully petition for a *writ of certiorari* to review the judgment of the Alaska Supreme Court in this case.

## OPINIONS BELOW

*Weiss v. State of Alaska*, Opinion No. 4816 (Alaska May 2, 1997). (Appendix A).

*State of Alaska v. Weiss*, 706 P.2d 681 (Alaska 1985). (Appendix B).

Memorandum Decision and Order Granting Final Approval to the HB 201 Settlement, Dec. 6, 1994. (Appendix C).

Memorandum Decision and Order (Beneficiaries), April 27, 1988. (Appendix D).

## JURISDICTION

The judgment of the Supreme Court of Alaska affirming the judgment of the trial court was entered on May 2, 1997. The jurisdiction of this court is invoked under 28 U.S.C. §1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, in pertinent part, provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

The Alaska Mental Health Enabling Act, Pub.L. No. 84-830, 70 Stat. 709, 711 (1956), at §202 (a) and (e), provides:

Sec 202. (a) The Territory of Alaska is hereby granted and shall be entitled to select, within ten years from the effective date of this Act, not to exceed one million acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection: Provided, That nothing herein contained shall affect any valid existing rights. All lands duly selected by the Territory of Alaska pursuant to this section shall be patented to the Territory by the Secretary of the Interior.

* * *

(e) All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, shall be administered by the Territory of Alaska as a public trust and such proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska. Such lands, income, and proceeds shall be managed and utilized in such manner as the Legislature of Alaska may provide. Such lands, together with any property acquired in exchange therefor or acquired out of the income or proceeds therefrom, may be sold, leased, mortgaged, exchanged, or otherwise disposed of in such manner as the Legislature of Alaska may provide, in order to obtain funds or other property to be invested, expended, or used by the Territory of Alaska. The authority of the Legislature of Alaska under this subsection shall be exercised in a manner compatible with the conditions and requirements imposed by other provisions of this Act.

Pertinent portions of Alaska Statutes are reproduced at Appendix J.

## INTRODUCTION

In 1956, Congress granted Alaska the right to select the best one million acres of available federal land in Alaska "as a public trust" to be used "first . . . to meet the necessary expenses of the mental health program of Alaska." However, the State never managed nor accounted for the Trust separately from its own land and enacted legislation in 1978 to formally transfer ownership to itself. For almost twenty years thereafter, the State of Alaska has relentlessly sought to retain land granted in trust under the Congressionally created Alaska Mental Health Lands Trust (Trust) for its own non-trust purposes in violation of federal law. In 1994, the State negotiated a settlement with intervenors in this class action that blessed its confiscation of Trust Land. The approval of that settlement -- in violation of the federal law creating that Trust and accomplished by procedures that do not comport with Due Process -- forms the basis of this petition.

At stake are hundreds of millions of dollars worth of resources that Alaska has misappropriated for purposes not intended by Congress. When discussing other states' predations on similar trusts, the Arizona Supreme Court observed nine years before Congress passed the statute at issue here:

> The sad experience of Congress with the handling by these twenty-three states of the granted lands, the sale thereof, and the investment of monies derived from a disposition of the granted lands, brought about a new policy which found expression in the Enabling Act for New Mexico and Arizona. *The dissipation of the funds by one device or another, sanctioned or permitted by the legislatures of the several states*, left a scandal in virtually every state and these granted lands and the monies derived from a disposition thereof were so poorly administered, so unwisely invested and dissipated, that Congress concluded to make sure, in light of experiences of the past, that such would not occur in the new states of New Mexico and Arizona.

*Murphy v. State*, 181 P.2d 336, 344 (Ariz. 1947) (emphasis added). Here, employing the class action settlement approval process, the Alaska Supreme Court allowed the same dissipation recounted in *Murphy* in violation of the Alaska Mental Health Enabling Act and Due Process.

## STATEMENT OF THE CASE

In 1956, Congress granted Alaska the right to select one million acres of public (federal) land and directed:

> All lands granted to the Territory of Alaska under this section, together with the income therefrom and the proceeds from any dispositions thereof, shall be administered by the Territory of Alaska as a public trust and such proceeds and income shall first be applied to meet the necessary expenses of the mental health program of Alaska.

Sec. 202(e), Alaska Mental Health Enabling Act (hereinafter "Enabling Act"), Pub. L. No. 84-830, 70 Stat. 709 (1956).

After selecting the best available land in Alaska for income production (Exc. at 670),[1] the State never established trust management -- not even creating a trust account. (App. B at 3). Because the land was so desirable, there was tremendous political pressure on the Alaska government to utilize it for non-trust purposes (App. C at 7), and in 1978, the Alaska legislature enacted legislation "redesignating" Mental Health Trust Land as its own general grant land. (App. B at 3). As the trial court observed in its decision regarding preliminary approval of the settlement: "DNR [the Alaska Department of Natural Resources] generally has managed the lands as if there was no mental health lands trust and as if DNR had no fiduciary obligations to the beneficiaries of the trust." (Exc. at 705). By 1985, less than 35% of the Trust's land remained intact. (App. A at 6).

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[1] The designation "Exc." is to the Excerpt of Record prepared for the Alaska Supreme Court.

On November 26, 1982, one of the legislators who voted for "redesignating" Trust Land (hereinafter "Original Class Counsel"), filed the complaint in this action against the State of Alaska, naming Petitioner Weiss herein as a representative plaintiff on behalf of "all persons who are residents of the State of Alaska who will require mental health services." (Exc. at 23). The complaint sought to (1) invalidate the 1978 redesignation statute as a violation of the Enabling Act, (2) establish a trust account, and (3) require the State to administer the Trust in accordance with the Enabling Act.[2] (Exc. at 24). The class was certified on January 26, 1983, under Ak. R. Civ. P. 23(b)(2) with Petitioner Weiss designated a class representative. (Exc. at 27).

By Memorandum Decision dated June 14, 1983, the trial court granted partial summary judgment against the State and ordered an accounting, but decided invalidation of the 1978 redesignation legislation was an "improper remedy," citing the Alaska Supreme Court case of *State v. University of Alaska*, 624 P.2d 807, 815 (Alaska 1981). (App. E at 4). On September 5, 1984, without consulting Mr. Weiss or any other class representative, Original Class Counsel and counsel for the State stipulated to entry of a final judgment as to less than all "issues" under Ak. R. Civ. P. 54(b), in order to allow an immediate appeal to the Alaska Supreme Court. (App. H). Paragraph 4 of the stipulation provides that in calculating the amount due to the Trust from the State for taking all of the Trust's land under the redesignation statute, the State is allowed a credit (a deduction or "set-off") in the amount of all its mental health services appropriations. (App. H-3). In other words, if the Trust Land was worth $100 million and the State had spent $100 million for mental health services from its general fund, *under the stipulation, the State owed nothing for taking all of the Trust's land.* Nine days later, on September 14, 1984, the form of judgment prepared by the State and lodged with the stipulation was entered by the trial court (hereinafter the "Rule 54(b) Judgment"). (App. F).

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[2] This action is completely predicated upon compliance with the federal Enabling Act and because, as is apparent, errors of federal law were raised throughout, Petitioners are not separately identifying Rule 14(g)(*i*) in each instance.

On September 26, 1984, Petitioner Nanuwak (along with the Alaska Mental Health Association and John Martin, on behalf of themselves and all others similarly situated), through counsel of record here, moved to intervene because "the interests of the class members were being so seriously jeopardized with immediate harm" by the representation of Original Class Counsel. (WIR at 310).[3] In addition to joining the Complaint, Petitioner Nanuwak filed additional claims seeking orders (1) invalidating transfers of Trust Land to third parties, (2) depositing all Trust Lands "into the public trust mandated by the Enabling Act to be administered according to law," and (c) "establishing an independent Board to act as the Trustee . . . [with] sufficient independent public member to foreclose future violations of the Trust." (Exc. at 47). On October 31, 1984, the trial court denied this motion to intervene as untimely. (Exc. at 51).

The State appealed the Rule 54(b) judgment, arguing that providing a mental health program "fulfills its obligations according to the [Enabling Act], freeing the grant lands for other public purposes." (App. B at 5). Original Class Counsel cross-appealed "the trial court's failure to rule the [1978 redesignation] legislation invalid." (App. B at 4). At oral argument on appeal, Original Class Counsel, who as a legislator had personally voted to abolish the Trust, explained his concession, which gave away the bulk of the class' claims via the set-off, as follows:

> Frankly, I think that it's arguable under the law of private trusts that we wouldn't have to give the credit but I think it's fair, and that's the reason we made the stipulation.

(Tr. II at 33, emphasis added).

The Alaska Supreme Court ruled that the "redesignation" of Trust lands constituted a breach of the State's fiduciary duty under the Enabling Act in *State v. Weiss*, 706 P.2d 681 (Alaska 1985), hereinafter referred to as *"Weiss I."* (App. B at 6). The

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[3] The designation "WIR" is reference to the *Weiss I* record on appeal in the appeal and cross appeal of the Rule 54(b) Judgment, and Petitioner Nanuwak's appeal of the denial of her motion to intervene.

credit (or "set-off") was then accepted without analysis as part of that court's October 4, 1985, remand "guidance" regarding calculation of damages in *Weiss I*:

> We take this opportunity to provide some guidance to the trial court to simplify its task.
>
> * * *
>
> To the extent that former mental health lands have been sold since the date of the conveyance the trust must be reimbursed for the fair market value at the time of sale. In calculating the total amount owed, the trial court should grant a set-off for mental health expenditures made by the state during the same period. In the event that expenditures exceeded the value of lands sold, the state need not furnish cash as part of the reconstitution.

(App. B at 7-8). After the remand under *Weiss I*, Original Class Counsel withdrew and Mr. David T. Walker, Esq., of Juneau, Alaska became counsel for the original plaintiffs. (App. C at 9 n.9).

Petitioner Nanuwak had also appealed the denial of her motion to intervene, citing as examples of inadequate representation Original Class Counsel's running of the case without consultation with any class members and that he had conceded to the State via the stipulation the dissipation of the Trust's *corpus* through the set-off. (SC at 244-45, 249).[4] In an unpublished Alaska Supreme Court Order dated January 24, 1986, Petitioner Nanuwak, "on behalf of themselves and all others similarly situated," was permitted to intervene "in future proceedings." (Exc. at 54, as clarified at Exc. 62). Based on this, the trial court permitted Petitioner Nanuwak's intervention, "only insofar [as their claims] relate directly to the reconstitution of the trust under [*Weiss I*]." (Exc. at 61). Petitioners Weiss and Nanuwak have

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[4] The designation "SC" is to proceedings in the Alaska Supreme Court of the appeal and cross appeal of the Rule 54(b) Judgment, and Petitioner Nanuwak's appeal of the denial of her motion to intervene.

worked very closely together since Mr. Walker began representing Petitioner Weiss and are joining in the Petition.

Following *Weiss I*, most of the parties' efforts on remand were spent negotiating and attempting to implement two proposed settlements, both of which the State later withdrew from prior to approval. (App. C at 12, *et seq.*). The first such settlement, enacted in 1987 as Chapter 48 Session Laws of Alaska 1987 (Chapter 48), provided that the State would "rent" the Trust's land for 8% of its value (re-determined every five years) and established the Interim Mental Health Trust Commission to formulate the procedures for determining the value. (App. C at 12-13).

At that point, Respondents Bosel, *et al.*, anticipating a huge income stream going into the Trust for the "mental health program," intervened as plaintiffs to "assure adequate representation of the developmentally disabled who were potential members of the class" and sought to have "the mentally retarded and mentally defective individuals be declared to be among the intended beneficiaries of the trust and members of the class."[5] (App. C at 10). By Order dated March 31, 1987, Respondents Bosel were "granted leave to intervene as parties plaintiff," but were not designated class representatives. (Exhibit 4 to October 4, 1996, motion for reconsideration of the Alaska Supreme Court's September 26, 1996, order).

Seeing the same funding source, Respondents H.L., *et al.*, "sought to intervene [as plaintiffs] 'to assure better representation of the class' and to assure that the relief obtained in this action reflects the needs and characteristics of [Chronic Alcoholics with Psychosis].'" (App. C at 10). By Order dated June 1, 1987, Respondents H.L. were "granted leave to intervene as parties plaintiff," but were not designated class representatives. (Exhibit 3 to October 4, 1996, motion for reconsideration of the Alaska Supreme Court's September 26, 1996, order).

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[5] Counsel for Bosel had been notified by counsel of record here in 1984, at the time of Petitioner Nanuwak's motion to intervene, that their interests might be at stake in the litigation but they chose not to participate at that time. (R. at 6907).

No one disputed that Chronic Alcoholics with Psychosis were entitled to the benefits of the Trust, but the entitlement of the mentally retarded and defective and the right of the State to add beneficiaries to the federally created Trust were disputed by Petitioner Nanuwak.

> These plaintiffs argue that Congress deliberately excluded the mentally retarded and mentally defective from receiving benefits under the trust. The primary focus of [these plaintiffs'] argument is that the State may not remove beneficiaries from nor add beneficiaries to those intended by Congress.

(App. D at 3). On April 27, 1988, the trial court ruled that both groups were beneficiaries and that "it is within the discretion of the State to include other groups as recipients of services by the mental health program." (App. D at 13, incl. n.6).

On April 17, 1990, the State notified interested parties that it "refused to follow the [Interim Mental Health Trust] Commission's procedures for determining fair market value." (App. C at 13). "After the impasse in the Chapter 48 process was reached, [on July 9, 1990] plaintiffs obtained a preliminary injunction prohibiting the State from taking any further action on mental health lands." (App. C at 13). On August 6, 1990, Respondent Usibelli Coal Company, a coal lessee of Trust Land moved to intervene "for the dual purpose of seeking necessary and appropriate relief from the court's preliminary injunction and for obtaining a declaration that Usibelli's third party rights are valid." On August 22, 1990, Respondent Idemitsu Alaska, Inc., another coal lessee of Trust Land moved to intervene as a defendant and for relief from the preliminary injunction. On April 7, 1991, Idemitsu was permitted to intervene as a defendant "for the sole purpose of seeking relief from the preliminary injunction."

The State and Petitioners then negotiated and submitted to the trial court for preliminary approval the April 6, 1992 Settlement Agreement that (a) required management of the Trust "solely in the best interests of the beneficiaries," and (b) would

have reconstituted the Trust with as much of its original endowment as possible and replacement of the rest with land of equal value and income earning potential. (Exc. at 289). This settlement represented a 100% recovery of the value and earning capacity of the original trust endowment. (Exc. at 289). However, certain "outside interests," including Respondents Alaska Center for the Environment, Alaska Sportfishing Association, Lynn Canal Conservation, Northern Alaska Environmental Center, Sierra Club, Southeast Alaska Conservation Council, Susitna Valley Association, and Trout Unlimited were permitted to intervene to attack the "land based trust reconstitution." (App. C at 14-15, incl. nn.14 and 15). Respondents Marathon Oil Company and Union Oil Company of California were also allowed to intervene to challenge the "legality of transfer of the State's interest as lessor in oil and gas rights" to the Trust as part of that settlement. (App. C at 15).

Respondents H.L. opposed approval of this settlement, demanding a cash-based rather than a land based trust. (R. at 871). "Although [Counsel] for Respondents Bosel signed the written [settlement] agreement on April 6, 1992, he formally withdrew his support for it in December 1992," and switched sides.[6] (App. C at 15).

The trial court found that the April 6, 1992 Settlement Agreement "appears to provide the class with as much, if not more, than could be obtained through trial," (Exc. at 385), and concluded that it constituted a "potentially reasonable and adequate remedy." (Exc. at 389). However, the trial court denied preliminary approval on December 30, 1993, because of concerns that the settlement would not work as planned and, if not, could be terminated. The trial court, nevertheless, *invited the parties to resubmit their agreement* if the problems the court found were corrected. (Exc. 392). Following this decision, David Walker, counsel for Petitioner Weiss, met with the then Alaska Attorney General and they both agreed that the problems identified by the court with the April 6, 1992 Settlement "could, as a technical

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[6] He is now the Executive Director of the Trust Authority created under the settlement which is the subject of this Petition.

matter, be easily corrected." (Exc. 544, ¶48). The Alaska Attorney General "indicated that it was his intention to pursue such corrections." *Id.* However, on January 5, 1994, after receiving a memorandum from a new Commissioner of the Department of Natural Resources regarding settlement negotiations, the Attorney General resigned, effective immediately. (Exc. at 544, ¶49).

The State's new regime then determined to enact legislation to reconstitute the Trust under their interpretation of *Weiss I*, that would take effect unless the State's settlement offer was accepted and approved by the trial court in a period of less than six months from its enactment. In the trial court's words:

> The State . . . pursue[d] a contingency plan by advocating two sets of [legislative] provisions, one for settlement and one for on-going litigation. The settlement provisions would become effective only if the case was dismissed by [December 15, 1994]. . . . These provisions and the deadline have been called 'cram-down' provisions by objectors to the settlement.

(App. C at 17). During the negotiations that occurred under the threat of this "cram-down" legislation, counsel for Respondents Bosel informed the beneficiaries that neither he nor counsel for H.L. thought that "pursuing the litigation would achieve anything for the beneficiaries." (Exc. at 551, ¶67). The State then negotiated the current "take it or leave it" settlement with counsel for Respondents H.L. and Bosel, rather than with Petitioners, when it appeared Petitioners would not accede to the State's demands. (Exc. at 561, ¶89).

Under the settlement they negotiated, which is now at issue, all dispositions of Trust land in breach of trust were ratified. (Sec. 41, Chapter 5 First Special Session Laws of Alaska 1994 reproduced at App. J at 1). Under this settlement, only land that no one else wanted was included in the Trust. (App. C at 94)("non-class interests appeared to have 'first pick' from original trust lands and the pool of potential substitute lands"). For example, leased coal land, generating approximately $1 million in

annual revenues was removed from the Trust because the coal lessees wanted it excluded. (App. C at 59 n.68). "The only reason to exclude these lands was the political power of the coal industry. Complete justice would have demanded their return to the trust." (App. C at 88 n.103). At final approval, the trial court acknowledged:

> Everyone agrees that the lands in the reconstituted trust under [the settlement] have a total value less than that of the original trust lands. The difference in value is compensated with [a] $200 million cash payment and establishment of the Trust Authority.

(App. C at 94).

A Trust Authority was created, but it was not given the power to manage the Trust's land. Instead, the Department of Natural Resources, which manages the state's other land, was given the authority to manage the reconstituted Trust Land under the "provisions of law applicable to other state land."[7] Alaska Statutes (AS) 38.05.801(b)(1). (App. J at 1). As partial compensation for the loss in the value of the Trust's *corpus* under the settlement agreement (but not the statute), the Trust Authority was promised the power to spend the Trust's income "without and free of further legislative appropriation." (App. C at 27, incl. n.34). When spending this income, the Trust Authority may spend the income on services "which supplement the state's basic mental health program," rather than the "necessary expenses" mandated in the Enabling Act. (Exc. at 707). This settlement was agreed to by Respondents H.L. and Bosel based explicitly upon their counsels' acceptance that the "set-off" stipulated to by Original Class Counsel and incorporated into *Weiss I* eliminated any effective remedy for the State's breach of trust. (2/10/97 Tr. at 26-27).

As pertinent here, Petitioners objected to the proposed settlement and related judgment because it:

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[7] This directive is subject to being managed consistent with the "trust principles imposed on the State by the Enabling Act."

(1) compared very unfavorably with a proper evaluation of the class' claims under federal law, (R. at 23737-23755),[8]

(2) violates federal law in that:

(a) the management scheme violates the duty of undivided loyalty to Trust beneficiaries, (R. at 23758-23761),

(b) it allows Trust funds to be spent on services other than "first for the necessary expenses of the mental health program," (R. at 23761-23762),

(c) it allows the State to add beneficiaries to the Trust who were not beneficiaries as determined by Congress, (*See* App. D at 3), and

(d) it designates mentally retarded and mentally defective individuals as beneficiaries, (*See* App. D at 3),[9]

and

(3) was the product of inadequate representation, including that:

(a) Original Class Counsel's stipulation to the set-off was an unauthorized and unwarranted concession of a major class claim, (R. at 23734-23735),

(b) counsel for H.L. and Bosel, who proposed the settlement, did so despite failing completely to develop information about the class' claims for mismanagement damages, which claims could total over $1 billion, (R. at 23809-23811),

(c) enforcement of federal rights under the Enabling Act was not the goal of H.L. and Bosel, (R. at 23769),

(d) H.L. and Bosel put third parties' interests ahead of the class', (R. at 23769-23771),[10]

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[8] The designation "R." is reference to the *Weiss II* record on appeal of the trial court's approval of the settlement at issue here.

[9] The objections to the State having the right to add beneficiaries and the inclusion of mentally retarded and defective individuals as beneficiaries were actually made in connection with the earlier proceedings resulting in the court's April 27, 1988 decision on the beneficiaries. (App. D). These decisions were incorporated into the settlement and became final at the same time the settlement was approved.

(e) counsel for H.L. and Bosel were not authorized to enter into the proposed settlement, (R at 23765-23768), and

(f) counsel for settling intervenors did not advise the beneficiaries who had been following the negotiations that they had dropped the "essential" requirement for settlement that it guarantee adequate funding of the mental health program. (R. at 23771).

In evaluating the merits of the class' claims in comparison to the settlement, the trial court concluded that neither the Alaska Supreme Court nor this Court were likely to review and reverse the Alaska Supreme Court's decision in *Weiss I* holding that, under federal law, Alaska could dispose of Trust assets contrary to the best interests of the beneficiaries and owe nothing because it had otherwise funded a mental health program (the setoff). (App. C at 63). The trial court also concluded, under federal law, that the Trust was unlikely to recover Trust Land disposed of in breach of trust. (App. C at 58-62).

In addition, after excluding evidence that mismanagement damages for the surface estate alone under federal law were over $700 million (Tr. XXI 724)("You asked for an opinion as to lost income opportunity costs. I sustained [an objection to] that. That will not come in"), and after ignoring testimony that damages for mismanagement of the mineral estate ran into the billions of dollars, the trial court refused to give the beneficiaries' mismanagement damages claim *any* value. (App. C at 63-65). The primary reason given was that they had never been seriously evaluated.

> [Petitioners] maintain that the plaintiff's claim for lost opportunity damages due to the State's mismanagement of the trust would more than nullify the setoff for state expenditures. *There has been no discovery done on this issue. There has been no attempt to litigate the issue.* This

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[10] As the trial court noted in its final approval decision: "Counsel for H.L. . . . argu[ed] that the court should consider the 'public interest' and the fairness of the settlement to all persons affected by it." (App. C-77).

> claim has largely been relegated to an occasional whisper from the back of the courtroom; *this claim has never played a central role in anyone's analysis of the case until the hearing on final approval.*

(App. C at 63, emphasis added).[11] The trial court then concluded that the mismanagement damages claim should also be given no value because they are difficult to prove and were subject to legal defenses such as the statute of limitations, waiver, the lateness of their assertion and the limitations the court had placed on the intervention of Petitioner Nanuwak. (App. C at 64-65).

The trial court did not address any of Petitioners' arguments and evidence regarding inadequacy of representation in granting final approval to the settlement. Instead, it found that counsel for H.L. and Bosel, "had sufficient experience and access to knowledgeable staff to represent the class adequately." (App. C at 89).

The Alaska Supreme Court affirmed this decision on May 2, 1997, in Opinion No. 4816, not yet reported, hereinafter referred to as "*Weiss II.*" (App. A). With respect to the "set-off," the Alaska Supreme Court held:

> [The trial court] reasoned that neither we nor the United States Supreme Court would be likely to review and reverse our decision in *Weiss [I]*. . . . [Petitioner] counters that our statement in *Weiss [I]* allowing the set-off was merely the product of a dubious and unauthorized stipulation made by plaintiff's original counsel.
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[11] It appears this statement is directed at Petitioners, but, as the trial court itself acknowledged, it was the *proponents' burden* to demonstrate the settlement fair. (App. C at 44). The statement is also incongruous as directed against Petitioners since the trial Court excluded and ignored Petitioners' expert evidence on mismanagement damages. And, of course, the hearing on final approval is the appropriate place for such an issue to be raised.

> In light of the provisions of the [Enabling Act], general trust principles, and our approval of a set-off in *Weiss [I]*, the superior court did not err in concluding that plaintiffs would face a significant risk that a set-off for the State's mental health expenditures 'has the capacity to destroy any affirmative cash recovery regardless of how many lands are determined to have been 'sold.' '

(App. A at 25, 27).

*Weiss II* agreed with the trial court that the Trust was not likely to be able to recover Trust land disposed of in breach of Trust to third parties:

> [The trial court] did not err in concluding that under the *bona fide* purchaser doctrine many if not most of these sales would be valid because the purchasers had neither actual nor constructive notice of any breach of trust.

(*Id.* at 19).

*Weiss II* also agreed with the trial court that the Trust was not likely to be able to recover Trust land taken by the State in breach of trust for its own non-trust purposes:

> [U]nlike the 1978 redesignation legislation, the State's transfer of land to legislatively designated areas or for the use of state agencies is 'a disposition of . . . trust lands for a specific use.' *Id.* [citing to *Weiss I* - App. B at 7] The State's action with respect to such land is thus similar to the action permitted under *University of Alaska*. The superior court therefore reasonably concluded that, under that case, the plaintiffs would face a high risk of not recovering this land through further litigation.

(*Id.* at 21).

*Weiss II* also affirmed rejection of the class' mismanagement damages claims:

> In light of [the trial court's] analysis, we hold that the superior court did not err in its evaluation of the plaintiffs' mismanagement claim.

(*Id.* at 29-30). The Alaska Supreme Court did not address Petitioners' argument that it was inadequate representation for settling counsel to concede the mismanagement claim without conducting any discovery or otherwise having any idea of the extent of the claim. (Pet. Br. at 96).[12]

*Weiss II* also affirmed the trial court's inclusion of the mentally retarded and mentally defective as members of the class:

> [The trial court] did not err in determining that Congress intended the developmentally disabled to be beneficiaries of the trust and hence members of the plaintiff class in this litigation.

(App. A. at 41).

Neither the trial court nor the Alaska Supreme Court addressed Petitioners' arguments that under federal law the State may neither add beneficiaries to those specified by Congress, nor use the Trust's income for "discretionary," "special," or "supplementary," programs rather than the "necessary expenses of the mental health program" specified by Congress. (Pet. Br. at 88-89).

The Alaska Supreme Court rejected Petitioners' argument that management of the Trust as general grant lands under the settlement violates the Enabling Act's requirement of undivided loyalty to the Trust and its beneficiaries. That court held that because the settlement also requires that the Trust's land be managed in accordance with the "requirements imposed by the Ena-

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[12] The designation "Pet. Br." is reference to Petitioners' opening brief to the Alaska Supreme Court.

bling Act," the settlement's provision that the Trust's land be managed as "other state land," did not violate the Enabling Act. (*Id.* at 33). The court then held that management of Trust Land for non-trust interests "is not necessarily incompatible" with the Enabling Act's requirements. (*Id.* at 33-34).

## REASONS FOR GRANTING THE WRIT

### 1. The Alaska Supreme Court Seriously Misapplied Federal Law.

In approving the judgment of the trial court, the Alaska Supreme Court adjudicated the federal rights created under the Enabling Act in two ways. First, in approving the settlement as fair, it considered the class' federal claims very weak by relying on its own decision in *Weiss I* allowing the set-off. Second, it held that Trust implementation under the settlement's terms complied with the Enabling Act. In both ways, the Alaska Supreme Court's conclusions on federal law directly conflict with the rulings of this and the other courts considering the same legal issues.

In *Asarco v. Kadish*, 490 U.S. 605, 633 (1989), this Court stated that its "concern for the integrity of the conditions imposed by [the Arizona Trust Enabling Act] has long been evident." Petitioners respectfully suggest that this Court should have no less concern for the conditions imposed by the Alaska Mental Health Enabling Act. Here, the only possibility of a federal determination of these important federal rights is through *certiorari*.[13] Eight years ago, this Court reviewed a state court decision involving another federal trust land grant in order to "assure that the binding application of federal law is uniform and ultimately subject to control by this Court." *Id.* at 621-2. The same considerations of uniformity of application and control by this Court apply with equal force here. Petitioners urge this Court grant the writ because the federal rights were just as finally adjudicated and the most valuable of the Trust's land were just as effectively

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[13] Since the State of Alaska is the defendant, the 11th Amendment probably precluded bringing this case in federal court. *See Idaho v. Coeur d'Alene Tribe*, 65 U.S.L.W. 4540 (June 23, 1997).

stripped from the Trust as if the Alaska Supreme Court had approved such actions in a ruling on the merits.

### A. Settlement Approval Rested Upon Grossly Erroneous Evaluations of the Class' Federal Rights.

The first question presented is whether erroneous determinations of federal rights in the context of a class action settlement vitiates the court's approval.

> Courts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement. [citation omitted]

*Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). That judgment here must be based on a proper assessment of the claims, which are all unquestionably federal questions because they involve rights under the federally created Enabling Act.

Federal courts review class action settlements to determine whether the trial court has properly assessed the class' claims. *See, e.g., In re: General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 814-17 (3rd Cir. 1995), *cert. denied* 516 U. S. ___, 116 S.Ct. 88; *In Re: General Motors Engine Interchange Litigation*, 594 F.2d 1106, 1132 n.44 (3rd Cir. 1979). A state court's failure to do so is as much an affront to federal law as a decision rejecting such claims on the merits.

One critical federal legal issue decided incorrectly by the Alaska Supreme Court was that the Enabling Act allows diminution (invasion) of the Trust's *corpus*. *Weiss I* allowed such diminution in the value of the *corpus* via the set-off. In *Weiss II*, the Alaska Supreme Court made clear that it was allowing diminution of the value of the Trust's *corpus* in the amount of the State's *annual* appropriations for mental health services:

> [Petitioners] argue that the superior court should have interpreted *Weiss [I]* as endorsing his position that the State

has a duty to preserve the trust corpus against 'diminution.'

We disagree. The AMHEA provides that trust lands 'may be sold, leased, mortgaged, exchanged, or otherwise disposed of in such manner as the Legislature of Alaska may provide in order to obtain funds or other property to be invested, expended, or used by the Territory of Alaska.' AMHEA § 202(e). **The superior court reasonably interpreted this language as expressly permitting the State to fund mental health programs by selling trust assets.** Thus the trial court did not err in reasoning that the AMHEA probably does not require that the State preserve the corpus of the trust *in perpetuity*.

(App. A at 25-26, boldface emphasis added, italics emphasis in original). However, this precise question was answered to the contrary by Senator Jackson, as chairman of the subcommittee reporting the Enabling Act, on the floor of the Senate just before it was passed in its final form:

Mr. SMATHERS. Is it proposed that the land shall be sold to some private interests to pay for the mental institution?

Mr. JACKSON. The land may be sold. *The purpose* of granting 1 million acres *is the same as in all other similar grants* such as the public school land-grant program. The *income* from sales or leases will be used to support the mental health program in Alaska. The *income* will be held in trust for that purpose.

(102 Cong. Rec. 9761 (June 7, 1956), emphasis added).

The Alaska Supreme Court's reliance on the "as the legislature may provide" language is misplaced. As this Court has stated:

[T]he 'as the State legislature may direct' language is not inconsistent with the express restrictions set forth in the

> Enabling Act. . . . [T]his language is properly viewed as authorizing the States to regulate the methods . . . as long as [they] comply with the dispositional requirements set forth in the Enabling Act.

*Asarco*, *supra* at 490 U.S. at 631. The Alaska Supreme Court is plainly wrong in holding the State has no duty to preserve the Trust's *corpus* for income generation under federal law.

Even if invasion of the Trust's *corpus* were allowed, any such action by the legislature, as trustee, must be done with undivided loyalty to the Trust. *Lassen v. Arizona*, 385 U.S. 584, 467 (1967) (only those beneficiaries specified by Congress may profit from the trust); *Ervien v. United States*, 251 U.S. 41, 47 (1919) (Congress' enumeration of purposes, "is necessarily exclusive of any other purpose."); *Nat. Parks & Conservation Ass'n. v. Bd. of State Lands*, 869 P.2d 909, 918 (Utah 1994)("The duty of loyalty requires a trustee to act only for the benefit of the beneficiaries"); *Plateau Min. v. Utah Div. of State Lands*, 802 P.2d 720, 729 (Utah 1990)("The State's duty of loyalty to beneficiaries . . . includes the duty not to act in the interest of a third party"); *County of Skamania v. State of Washington*, 685 P.2d 576, 580 (Wash. 1984). Thus, even if the Enabling Act allows invasion of the *corpus* for particular purposes, such invasion is only permissible if made solely upon the basis that it is in the best interests of the Trust's beneficiaries.

The State of Alaska did not satisfy this requirement of undivided loyalty because at the time it took the land for non-trust purposes, it did not even acknowledge that it had <u>any</u> fiduciary obligations to the Trust, let alone make any determination that giving the land away or otherwise disposing of it was in the best interests of the beneficiaries. As the trial court found:

> The State did not treat these lands differently from other state land even before the redesignation legislation. DNR did not manage the lands proactively to produce income for the trust. The State did not even maintain separate accounting for trust revenues.

(App. C-64).

In approving the settlement incorporating the set-off ruling, the Alaska Supreme Court never addressed Petitioners' argument that even if invasion of the *corpus* is allowed, it can be done only based on undivided loyalty to the interests of the Trust's beneficiaries. (Pet. Br. at 43; 2/10/97 Tr. at 6-7). Instead, relying on *Weiss I*, the court concluded that the set-off "has the capacity to destroy any affirmative cash recovery regardless of how many lands are determined to have been 'sold'" in breach of trust (App. A at 27), such "sales" to include the State's placing over a third of the Trust's land in State Parks and other conservation units (App. A at 21), and giving Trust Land away to municipalities. (App. A at 22). In other words, *Weiss I* as interpreted by *Weiss II* turns the paradigm of a trust *corpus* being used to generate income on an on-going basis on its head. Instead, the Alaska Supreme Court has established new law for federal land trusts in which such lands taken by a state for non-trust purposes can remain the property of the State (through reducing the Trust *corpus* permanently) if the state makes *annual* expenditures to fund a program. The set-off is unprecedented and unwarranted, and should be reversed by this Court.

Even if the "set-off" were allowed under federal law, there are other highly valuable claims that were improperly rejected. Thus, the settlement should also have been rejected because the Trust is entitled to recover (a) land disposed of in breach of trust, and (b) damages for mismanagement that equal or exceed the amount of money the State has spent on its mental health program.

*Weiss II* is contrary to the uniform authority that a federally created land trust is entitled to return of property disposed of in breach of trust. *Contra Asarco*, *supra* 490 U.S. 605 (affirming *Kadish v. Arizona State Land Dept.*, 747 P.2d 1183 (Ariz. 1987)); *City of Sierra Vista v. Babbitt*, 633 P.2d 333 (Ariz. 1981); *Arizona State Land Dept. v. Superior Court*, 633 P.2d 330 (Ariz. 1981); *Gladden Farms, Inc., v. State*, 633 P.2d 325 (Ariz. 1981); *Murphy*, *supra* 181 P.2d 336; *Propst v. Nebraska Bd. of*

*Educational Lands*, 55 N.W.2d 653 (Neb. 1953); *State v. Cooley*, 56 N.W.2d 129 (Neb. 1952); and *State ex rel. Ebke v. Board of Educational Lands and Funds*, 47 N.W.2d 520 (Neb. 1951).

Conflicting with this authority, *Weiss II* held the Trust would not likely recover its property conveyed in breach of trust:

> [The trial court] also did not err in concluding under the *bona fide* purchaser doctrine many if not most of these sales would be valid because the purchasers had neither actual nor constructive notice of any breach of trust.

(App. A at 19). This conclusion, however ignores that by virtue of the public notice of the Trust lands, no *bona fide* purchasers were even possible:

> The state as trustee of the lands and of the income therefrom is required to administer the trust estate under the rules of law applicable to trustees acting in a fiduciary capacity. The title of the lands is not vested in the state with all the ordinary incidents of other titles but the title thereto was granted to and vested in the state upon an express trust for the 'support of common schools' with no right or power of the state to use, dispose of, or alienate the lands or any part thereof, except as allowed by the Enabling Act and the Constitution. *Anyone dealing with the school lands must do so with knowledge of and subject to the trust obligation of the state.*

*Propst*, *supra* 55 N.W.2d at 657 (emphasis added).

In addition to the right to recover Trust property disposed of in breach of trust, the class had a multi-billion dollar claim for damages accruing from the State's admitted 30+ years of mismanagement. This mismanagement not only took the form of failing to account for the revenues received, but also failing to make the land productive. (App. C at 64). However, the Alaska Supreme Court affirmed the trial court's (a) refusal to hear expert testimony that mismanagement damages for surface use alone was over $700 million, (b) ignoring of evidence offered by Petitioners

that mismanagement damages for the mineral estate was over $2 billion, (c) holding that the Trust might not be entitled to mismanagement damages at all, and (d) refusing to give the claim any value because, *inter alia*, it had never been seriously evaluated by the proponents of the settlement. (App. A at 27-30).

The trial court gave the class' mismanagement damages no value because it concluded they were difficult to prove, and were subject to defenses such as the statute of limitations, waiver, the lateness of their assertion and the limitations the court had placed on the intervention of Petitioner Nanuwak, even though "there has been no discovery done" and "no attempt to litigate the issue." (App. C at 63). The Alaska Supreme Court affirmed, "in light of this analysis." (App. A at 29-30). The Alaska courts failed to recognize, however, that the Trust is entitled to mismanagement damages as a matter of *federal law*:

> Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust.

*United States v. Mitchell*, 463 U.S. 206, 226 (1983). It was also clearly improper for the Alaska courts to foreclose a major federal claim, in a class action, potentially valued in the billions of dollars according to proffered testimony, after acknowledging it had not been the subject of factual or legal development.

### B. The Judgment Approved by the Alaska Supreme Court Violates Federal Law.

*Weiss II* also erroneously approved implementation of the Trust via the settlement in ways which violate the Enabling Act. The management scheme for the Trust's land under the settlement violates the duty of undivided loyalty and the settlement allows the Trust's income to be spent on purposes not authorized by Congress.

The settlement approved by the Alaska Supreme Court in this case explicitly makes the *State's non-trust interests* one of the Trust's management objectives. In AS 38.05.801(b)(1) (App. J-1), Alaska Mental Health Trust Land is to be managed "under those provisions of law applicable to other state land." Alaska's general grant lands may be managed for multiple purposes, including scenic enjoyment, preservation or even to subsidize economic development. This clear violation of the duty of undivided loyalty was, however, held to be saved by the proviso that it is subject to "the trust principles imposed on the state by the Enabling Act." (App. A at 33); *see* AS 38.05.801(a) and (b).[14] However, as *Skamania*, *supra* 685 P.2d at 580, makes clear, even having competing goals is a violation of the duty of undivided loyalty. ("This divided loyalty constitutes a breach of trust"); *see also Dep't of State Lands v. Pettibone*, 702 P.2d 948, 954 (Mont. 1985) (statutory management scheme devaluing Montana School Trust Land invalid). Denial of *certiorari* in this case will encourage other states in their ongoing efforts to achieve more flexibility in their management of similar federally granted trust land in derogation of the purposes specified by Congress in those grants.

In addition to allowing the Trust land itself to be used for non-trust purposes, *Weiss II* approves the diversion of whatever money is made from the land from those purposes mandated by Congress by letting stand, without comment, the trial court's decision allowing the Alaska State Legislature to add to the beneficiaries specified by Congress. This dilutes the interests of the beneficiaries designated by Congress and is not allowed under federal law. *See*, *Lassen*, *supra* 385 U.S. at 466; *Ervien*, *supra* 251 U.S. at 47; *United States v. New Mexico*, 536 F.2d 1324, 1327 (10th Cir. 1976). This Court in *Rosado v. Wyman*, 397 U.S. 397, 423 (1970), citing *Lassen*, made clear that the determination of who is to receive the benefits of the Trust "is shaped by Congress, not the states." Petitioners respectfully suggest *certiorari* be granted to resolve this conflict and require compliance with federal law.

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[14] Reproduced at App. J-1.

The approved settlement similarly violates federal law by allowing the Trust's funds to be used to fund services "which supplement the state's basic mental health program" rather than for its "necessary expenses" as mandated by Congress. (Exc. at 707)(trial court decision granting preliminary approval). The settlement's allowance of Trust expenditures on "supplementary" expenses was specifically explained to be "extra" or "discretionary" services. It was specifically contemplated that under the settlement, the Trust's income could be used for these other purposes while "basic" or "necessary" mental health services were left unfunded. (Exc. at 550-51). As Petitioners pointed out in their opposition to final approval of the settlement:

> [T]he proponents say it is at least permissible for the Trust Authority to ignore the Core Beneficiaries who are being discharged to the streets, homeless shelters, dumpsters, soup kitchens and jails and spend the Trust's money on 'special projects' or 'enhancements.' . . . Under this regime, what are the Core Beneficiaries really getting in exchange for giving up their one million acres of the best land in the State?

(R. at 23747).[15] *Weiss II* failed to address this point raised by Petitioners in their opening brief at 89-91. If *certiorari* is denied, the benefits of the Trust will have been successfully diverted by the settling parties from the purposes Congress mandated.

The judgment approved in *Weiss II* also erroneously held that the mentally retarded and mentally defective are beneficiaries in contravention of the Enabling Act. (App. A at 41). The original House version of the Enabling Act included the mentally retarded and mentally deficient by including them in the definition of "mentally ill." (Exc. at 2-3). However, the Bill's manager in the Senate, disagreed that they should be included:

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[15] This provision demonstrates that the settling plaintiff intervenors were not representing those concerned with funding the "necessary expenses of the mental health program" for which the Trust was created.

> Senator JACKSON. I want to say, Congressman O'Brien, that that provision bothers me quite a bit. I think that the committee certainly is going to have to hear from the Department on the meaning of the words 'mentally retarded.' There are a lot of people who are mentally retarded that should not be under the provision of this bill.

(Exc. at 6). After a considerable amount of back and forth on the issue, including several attempts by the Executive Branch to include the mentally retarded and mentally defective, (Exc. at 7-22; R. at 6917-6921), the Senate passed the Enabling Act without the language to include them requested by the Executive Branch. Thus, the Senate specifically rejected including the mentally retarded and mentally defective, which was ultimately concurred in by the House. While funding programs for the mentally retarded and mentally defective is no doubt a laudable public purpose, Congress did not include them as beneficiaries of *this* Trust.

**2. The Class' Due Process Rights Were Violated.**

The judgment affirmed by the Alaska Supreme Court was also, fundamentally, the result of inadequate representation. Adequate representation is required to bind absent class members. *Hansberry v. Lee*, 311 U.S. 32, 61 (1940); *see also Phillips Petroleum Company v. Shutts*, 471 U.S. 797, 812, (1985) ("[T]he Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members").

The unauthorized set-off stipulation of Original Class Counsel is strikingly analogous to the stipulation that would not support a binding class judgment in *Hansberry v. Lee*. There, an untrue stipulation was executed by parties not aligned with the interests of the class. Here, without even discussing the matter with any class representative(s), Original Class Counsel, one of the legislators who voted to convert Alaska Mental Health Trust Land to General Grant Land in the first place, entered into an unwarranted stipulation allowing the State to reduce the value of

the Trust's *corpus* by the amount it spent on the mental health program even though he thought it was not supported by law. As in *Hansberry*, the class' interests were not being represented by the person entering into the stipulation.

In order for representation to be adequate in the class action context, other courts have held that *counsel's prosecution* of the class' claims must be "vigorous and tenacious." *Gonzalez v. Cassidy*, 474 F.2d 67, 75 (5th Cir. 1973). In *In re: G.M. Pick-Up*, *supra* 55 F.3d at 801-804, the Third Circuit reversed a settlement where the circumstances suggested less than vigorous representation. In *In Re: G.M. Engine Interchange*, *supra* 594 F.2d 1106, the Seventh Circuit reversed a class action settlement where class counsel entered into unauthorized negotiations and where the extent of the class' damages were undetermined.

Here, Original Class Counsel voluntarily abandoned the class' claim to an affirmative monetary remedy and conceded a significant class defense worth hundreds of millions of dollars. In the settlement review calculus, according to the Alaska courts, this stipulated set-off "negated any cash recovery" no matter how much of the Trust's value had been disposed of in breach of trust. (App. A at 25-27). There was no compensation for this concession, it was not subjected to judicial scrutiny and it was unwarranted. Neither the trial court nor the Alaska Supreme Court addressed whether the stipulation was the product of adequate representation. Instead, the settlement based upon the set-off was approved because the Alaska Supreme Court agreed with the trial court that, as a "litigation risk," this Court was not likely to review and reverse the set-off approved in *Weiss I*. (App. A at 25). The inadequate representation of Original Class Counsel in stipulating to the set-off drove settling counsel to the unfavorable settlement here.

It was compounded by settling counsel's own inadequate representation in failing to evaluate a major class claim -- mismanagement damages -- that could have eliminated the set-off entirely. As he admitted at the fairness hearing:

> I am not suggesting by that that those claims haven't been made and that they don't exist and that they might be real. It's just that there's been no discovery to establish their size, the extent, the legitimacy of them . . .

(Tr. XXVI-751).

The Third and Seventh Circuits have unequivocally held that the trial court is required to consider whether the settlement is the result of adequate representation. *In re: G.M Pick-Up*, *supra* 55 F.3d at 801-804; *G.M. Engine Interchange*, *supra* 594 F.2d at 1124. *Weiss II* disagrees, instead holding that there is no requirement that the trial court make a finding of adequacy of representation. (App. A at 41, n.30)("[N]either that case [*In re General Motors Engine*] nor any other authority requires the trial court to make a specific finding that the class is adequately represented by counsel"). *Weiss II* goes on to hold that the trial court's consideration of the settlement negotiations would have met such a requirement in any event. (App. A at 41 n.30). The Alaska Supreme Court, however, failed to address how counsel negotiating the settlement could adequately represent the class without having any idea of the value of a major class claim, or any of the other instances of inadequate representation raised by Petitioners. Compounding the harm done here, is that the claims are federal claims and the inadequate representation further undermines Congress' scheme in creating federal rights.

While the Third and Seventh Circuits, at least, have required that the trial court stringently examine the adequacy of representation leading to a settlement and have enunciated standards, this Court has not yet done so. In the recent case of *Amchem Products, Inc., v. George Windsor,* No. 94-1474 at 20 n.20, 65 U.S.L.W. 4635 (June 25, 1997), this Court acknowledged that adequacy of representation necessarily involves the "competency and conflicts of class counsel," but declined to address the adequacy of counsel issues in light of its disposition of the case on other grounds. *See also*, *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, n.13 (1982). Petitioners respectfully suggest that this case presents the perfect opportunity to

enunciate a Due Process standard for the adequacy of class counsel's representation; that Due Process demands, at the least, some understanding of all important class claims. Future class actions of all kinds require such guidance.

## CONCLUSION

For the foregoing reasons, Petitioners respectfully urge their Petition for Writ of *Certiorari* be granted.

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